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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal From The Supreme Court Of Virginia

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

Article VI, § 10 of the Constitution of Virginia provides, in part:

> "The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential.
>
> "If the Commission finds the charges to be well-founded, it may file a formal complaint before the Supreme Court.
>
> "Upon the filing of a complaint, the Supreme Court shall conduct a hearing in open court and, upon a finding of disability which is or is likely to be permanent and which seriously interferes with the performance by the judge of his duties, shall retire the judge from office. A judge retired under this authority shall be considered for the purpose of retirement benefits to have retired voluntarily.
>
> "If the Supreme Court after the hearing on the complaint finds that the judge has engaged in misconduct while in office, or that he has persistently failed to perform the duties of his office, or that he has engaged in conduct prejudicial to the proper administration of justice, it shall censure him or shall remove him from office."

Sections 2.1-37.1 through 2.1-37.18 of the Code of Virginia provide for the establishment, nature of and rules relating to the Virginia Judicial Inquiry and Review Commission. Section 2.1-37.13 provides, in relevant part, as follows:

> "All papers filed with and proceedings before the Commission, and under the two preceding sections (§ § 2.1-37.11 ['Order compelling witnesses to attend and testify'], 2.1-37.12 ['Depositions']), including the

> identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. . . .
>
> "All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with the tribunal, shall be kept in the confidential files of the Commission.
>
> "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

QUESTIONS PRESENTED

1. May the Commonwealth of Virginia subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before the State Judicial Inquiry and Review Commission, where such proceedings are expressly declared to be confidential by the State Constitution and Statutes?

2. Is the Commonwealth of Virginia required to produce actual facts of a clear and present danger to the administration of justice to support a conviction under Virginia Code Section 2.1-37.13, where such determination has been made in the State Constitution and Statute?

3. Is Virginia Code Section 2.1-37.13 unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

This case arose out of an article published on October 4, 1975, by The Virginian-Pilot, a newspaper published by

Landmark. On the first page of the second section, an article appeared concerning an investigation conducted by the Virginia Judicial Inquiry and Review Commission [hereafter "Commission"]. The article discussed a Commission investigation into the general competence of a named judge of a local court. The article noted that Commission proceedings are conducted in strict secrecy since it is a misdemeanor to reveal Commission actions. (JA 47).

A grand jury of the Circuit Court of the City of Norfolk indicted Landmark on November 5, 1975, for the publication of the article of October 4, 1975, in violation of § 2.1-37.13 of the Code of Virginia (1950), as amended.

The trial commenced on December 10, 1975, after the trial court had denied Landmark's Motion to Dismiss and Quash the Indictment. The case was tried basically upon a stipulation of facts. The stipulation provided that Landmark published The Virginian-Pilot; that the article of October 4, 1975, carried a story naming a judge subject to a Commission investigation; and that at the time of the publication, the Commission had not filed any formal complaint with the Supreme Court of Virginia (JA 6).

Joseph W. Dunn, Jr., the managing editor of The Virginian-Pilot testified that he had decided to publish the article upon his belief it was an important story. He further testified that while he understood it was a misdemeanor to divulge such information, he considered the statute to apply only to those who participated in the proceedings. Mr. Dunn further testified that no reporter, employee or agent of Landmark had participated in the Commission proceedings. (JA 42-43).

The trial court found Landmark guilty on January 15, 1976, and imposed a fine of $500 and the payment of costs. (JA 50).

Upon appeal to the Supreme Court of Virginia, the conviction was affirmed with one justice dissenting. The Virginia Supreme Court recognized that the case represented a direct confrontation between the First Amendment and the Virginia statute which was both serious and important. (JA 59-60).

The Virginia Supreme Court viewed the present case as one involving "subsequent punishment" rather than a prior restraint. (JA 62). This treatment of the case is not contested by Landmark. Appellant's brief 7. The Court found that the statute sprang from a "clear and well-defined legislative declaration" that publication of Commission proceedings before being filed with the Supreme Court was "so contrary to the public interest" that criminal sanctions were warranted. (JA 69). The Court found that the confidentiality of Commission proceedings served three interests:

> "(1) Protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious." (JA 72-73).

A Notice of Appeal was filed by Landmark on April 15, 1977, and this Court noted probable jurisdiction on June 13, 1977.

SUMMARY OF ARGUMENT

This case focuses upon a confrontation between the First Amendment guarantee of freedom of the press and a Virginia statute which imposes criminal sanctions for breach

of the confidentiality of proceedings before the Virginia Judicial Inquiry and Review Commission.

This Court has recognized that freedom of the press is not an absolute right, and the state may punish its abuse. *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931). The statutory scheme in question represents a legislative declaration that certain matters are to be confidential, and provides punishment for those who breach that confidentiality.

The statute in question does not prohibit nor curtail general comment or criticism concerning a judge or the conduct of his judicial affairs. Nor does the statute completely suppress the reporting of disciplinary proceedings against state judges. The statute applies only to information which the state has chosen not to place in the public domain.

A state has the right to make the judgment that certain matters are not to be made public. A collary right exists to punish those who make known that which the state has chosen to keep confidential.

The relationship of the statute in question to the administration of justice is discussed in Part II of this brief. The purposes to be served by the confidentiality of Commission proceedings spring both from history and experience.

History establishes that the methods of dealing with disabled or unfit judges by legislative impeachment, or removal were seldom used and generally unsatisfactory. Consequently, the public interest demanded new and bold steps to deal with a subject so vital to the functioning of the system of justice.

In reponse to this unsatisfactory situation, 42 jurisdictions now provide for some type of judicial disciplinary procedure. In all jurisdictions, with the possible exception of Puerto Rico, a requirement of confidentiality is provided for by Constitution, statute or rule. A clear and present

danger to the administration of justice by premature disclosure of these sensitive proceedings is well established by the collective judgment of the people.

The final portion of this brief responds to the challenge that the Virginia statute is vague and overbroad.

The statute being penal in nature must be strictly construed. But, when this test is applied, the statute does not suffer the doubt or ambiguity asserted by Landmark. The statute is drawn in clear and concise language which enables one to reasonably understand that which is proscribed.

The statute states in unmistakable terms that information concerning a proceeding before the Commission, including the identity of the judge under investigation, shall be confidential and shall remain so until a formal complaint against the judge is filed in the Supreme Court of Virginia.

The statute does not suffer from overbreadth. The circumstances suggested in which the statute might apply do not deal with concrete situations, and actual practice shows them to be unfounded and unwarranted.

ARGUMENT

I.

The Commonwealth May Impose Criminal Sanctions For Divulging Information Regarding Proceedings Before The State Judicial Inquiry And Review Commission Where Such Proceedings Have Been Expressly Declared To Be Confidential By State Constitution and Statute.

The question of whether a state can impose criminal sanctions for publishing confidential materials of a Commission which investigates allegations of judicial misconduct is a case of first impression for this Court. The only other case which has called into question the constitutionality of the

requirement of confidentiality of such a proceeding arose in Hawaii. In an unpublished opinion,[3] the lower court upheld the constitutionality of the statute, and the case is on appeal in the Supreme Court of Hawaii. It would appear that this Court reserved judgment on just such an issue in *Cox Broadcasting Corp* v. *Cohn*, 420 U.S. 469 (1975).[3]

Landmark has characterized the issue before this Court as one in which the State has made it a crime to publish truthful information about public officials with respect to the performance of their duties. As to this characterization Landmark casts its net too broadly. The statute neither deals with public officials as a class nor does it seek to stifle debate about the functioning and conduct of public officials. The statute is limited in scope and proposes to deal only with proceedings before the Judicial Inquiry and Review Commission when it is investigating allegations of judicial misconduct. As found by the Supreme Court of Virginia "the statute does not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs." 217 Va. at 712. Furthermore, the statute specifically provides that records of any Commission proceeding filed with the Supreme Court lose their confidential character, thereby giving the public and the press full and unrestrained freedom to discuss those matters which have reached the dignity of verified charges.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." Despite this language, freedom of the press does not mean the unlimited right to publish anything at all. This Court has refused to give protection to certain categories of speech—such as fighting words, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), or obscenity, *Roth* v. *United States*, 354 U.S. 476 (1957), or libel, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), or incitement, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

[3] *Partington* v. *State of Hawaii, et al.*, Civil No. 49320 (Hawaii 1st Cir. Apr. 21, 1977).

[3] 420 U.S. 469, 497 n. 27 (1975).

Mr. Chief Justice Hughes, writing for this Court in *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931), clearly enunciated the principle that a State may punish abuses by the press when he said, "liberty of speech, and of the press, is . . . not an absolute right, and the state may punish its abuse." Freedom of the press cannot be turned into so irrational a concept as to bring about a paralysis of the means for effective protection of other interests.[3]

Public expression may be subject to reasonable regulation when it serves a legitimate public interest. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).[4] The public interest found by the Supreme Court of Virginia upon which the questioned statute rests is the orderly administration of justice. (JA 70, 74).

As this case deals with the orderly administration of justice, it cannot be viewed as dealing with public officials

[3] "Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society." *Bridges* v. *California*, 314 U.S. 252, 293 (1941) (Frankfurter, J., dissenting).

[4] *See also Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Patterson* v. *Colorado*, 205 U.S., 454, 462 (1907).

in the abstract. Judges, while public officials, sit at the pinnacle of the system of justice, and exercise power which permeates every facet of public life. This power reaches to liberty itself.

As Justice Frankfurter once observed:

> "The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. The judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavor." *Pennekamp* v. *Florida*, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

Without question, citizens and the press have the right to criticize the conduct of judges, but the State also has the right and the duty to prevent public disclosure of governmental affairs in those areas in which disclosure may reasonably be thought to be inconsistent with the public interest.[5]

The need for secrecy in governmental affairs is expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted "such parts as may in their judgment require secrecy."[6]

This Court has repeatedly recognized the need for some secrecy in governmental affairs. *Zemel* v. *Rusk*, 381 U.S. 1

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[5] *Cf. United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.) *cert. denied* 93 S.Ct. 553 (1972) (relating to area of national security).

[6] U. S. Const., Art. I, § 5.

(1965); *United States* v. *Reynolds*, 345 U.S. 1 (1953). The secrecy which attends the conferences of the Justices of this Court is just another example of a determination that the administration of justice can best be served in an atmosphere free from the public glare.

It must be recognized that this case does not represent a situation where the State has conducted its affairs in a public atmosphere, and then sought to regulate what is published concerning such matters. The Commonwealth is fully cognizant of the rulings of this Court which hold that where the State places information in the public domain, it cannot restrain its publication. *Cox Broadcasting Corp* v. *Cohn, supra; Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539 (1976).[7]

This is not a case of a prior restraint, but clearly presents the issue of the right of a State, through its citizens and elected representatives, to declare certain matters of public interest to be confidential, and to punish those who breach that confidentiality. This difference in procedure is critical since the distinction between "prior restraint" and "subsequent punishment" is based upon "a theory deeply etched in our law", *viz.* that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

The statutory scheme followed by the Commonwealth in this case is consistent with the procedures outlined by this

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[7] *See also Sheppard* v. *Maxwell*, 384 U.S. 333 (1968); *Craig* v. *Harney*, 331 U.S. 367 (1947).

Court in *Cox Broadcasting Corp., supra.* In this regard, this Court stated:

> "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interest in privacy with the interests of the public to know and of the press to publish." 420 U.S. at 496.

The Commonwealth has complied with the dictates of *Cox,* by the passage of § 2.1-37.13. First, the Commonwealth has taken Commission matters out of the public domain by providing that proceedings of the Commission are to be confidential. The papers filed with the Commission are not made a part of any public record, and the proceedings are conducted in private. Second, the interests in privacy have been weighed with the interests of the public to know and of the press to publish. The Supreme Court of Virginia has found that § 2.1-37.13 represents a legislative declaration by the Virginia General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission. (JA 67).

The interests of the State in preserving respect for the judicial system on the one hand have been balanced with the interests of a free press on the other. In speaking of balancing competing interests, Mr. Justice Brandeis in *Whitney* v. *California,* 274 U.S. 357, 373 (1926), said:

> "[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral."

Section 2.1-37.13 has its genesis in Article VI, Section 10, of the Constitution of Virginia (1971). This constitutional provision itself provides that proceedings before the Commission shall be confidential. The necessity for confidentiality of Commission proceedings is self-evident from this statement:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious or frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries On The Constitution Of Virginia,* 764 (1974).

As noted by the Supreme Court of Virginia, the California experience furnishes significant support for the confidentiality of Commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge

> who would otherwise be reluctant to change his behavior lest the public view this as an admission of prior misconduct. . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

The American Bar Association has recommended that proceedings to review possible judicial misfeasance, nonfeasance and disability should be confidential until the Commission recommends discipline by the highest court, at which time the Commission's record, upon being filed with the Court, should become public. A.B.A. Standards for Criminal Justice, *The Function of the Trial Judge*, § 9.1 (Approved Draft 1972).[8]

The criminal sanction provided by § 2.1-37.13 is nothing more than the remedy suggested in the views expressed by a number of Justices of this Court in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (White and Stewart, J.J., concurring) (Marshall, J. concurring) (Blackmun, J., dissenting). This is apparent in the language of Mr. Justice White:

> "What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but

[8] *Accord*, Reath, *Judicial Evaluation—The Counterpart to Merit Selection*, 60 A.B.A.J. 1246, 1248 (1974); Hazard, *Commission Introduces New Standards of Judicial Administration*, 60 A.B.A.J. 912, 914 (1974).

> failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way." 403 U.S. at 733.

In *Oklahoma Publishing Co.* v. *District Court*, ... U.S. ....., 97 S.Ct. 430 (1977), this court had before it a case in which the press published the name and photograph of a juvenile charged with murder. Oklahoma by statute provides for the secrecy of juvenile proceedings and records unless ordered to be opened to the public. These statutes were not challenged since the information published by the press had been obtained in open court. In deciding that prior cases clearly prohibited restraints on publication of information obtained in proceedings open to the public, this Court noted that there was no evidence that the newspapers acquired the information unlawfully or even without the State's implicit approval.

In this case, the Commonwealth has neither made available the information published by Landmark nor has the Commonwealth given her implicit approval that the information be made public. Quite to the contrary, the Commonwealth had done all in her power to see that such information was not placed in the public domain. Additionally, the manner in which Landmark obtained the information may be criminal.

The record is silent concerning the manner in which Landmark secured its initial information concerning the investigation by the Commission. (JA 58, n.4). What is clear, however, is that Landmark thereafter attempted to solicit additional confidential information from the members of the Commission, the judge under investigation and the

persons who appeared as witnesses. (JA 47). This solicitation was with the full knowledge that by divulging information about Commission proceedings, such individuals would thereby be committing a misdemeanor. (JA 43, 47). By approaching participants in the Commission proceedings, and by cajoling them to commit a misdemeanor, Landmark itself would be guilty of the common-law offense of solicitation. *Wiseman* v. *Commonwealth,* 143 Va. 631, 130 S.E.2d 249 (1925).[9]

Is this not the same type of conduct which is condemned as violating fundamental fairness and shocking to the universal sense of justice when carried out in the context of Government solicitation of crime.[10] Is it acceptable conduct in our society for the Press to corrupt otherwise innocent citizens into breaching their oaths of secrecy and thereby committing a crime? The Commonwealth unhesitantly answers the former in the affirmative and the latter in the negative. It cannot be convincingly argued that the framers of the Constitution ever intended that the First Amendment freedom of the press was to be used as a shield to commit criminal offenses.

This very contention was soundly rejected by this Court in *Frohwerk* v. *United States,* 249 U.S. 204 (1919). In speaking for this Court, Mr. Justice Holmes observed:

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[9] *See also,* Annot., *Solicitation to Crime as a Substantive Common-law Offense,* 35 A.L.R. 961, 965 (1925); 21 Am. Jur. 2d *Criminal Law* § 114 (1965). The common-law remains in full force in Virginia unless altered by the General Assembly. Section 110, Code of Virginia (1950), as amended.

[10] Entrapment has been recognized as a defense to a criminal prosecution when the government instigates a criminal act by persons otherwise innocent. *Sorrells* v. *United States,* 287 U.S. 435 (1932); *United States* v. *Russell,* 411 U.S. 423 (1973).

> "[T]he 1st Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder . . . would be an unconstitutional interference with free speech." 249 U.S. at 206.

Without question the First Amendment seeks to protect the freedom of the press to report and to criticize judicial conduct. In publishing the article upon which this case is based, Landmark is asserting something more—the right to publish information concerning inquiries into judicial misconduct which by Constitutional mandate is to be confidential. The traditional notion of freedom of the press is not in issue here. Landmark is not free to publish this confidential information with impunity anymore than it could publish private documents in violation of a copyright, or disclose protected trade secrets, or invade individual privacy.[11]

It is for the State to provide for the security of those institutions which provide its citizens a strong system of justice. And, unless the State safeguards its own capacity to function, then society itself could become so disorganized that all rights and liberties would be endangered. *United States* v. *United States District Court,* 407 U.S. 297 (1972).

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining

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[11] "In principle as in practice, then, the 'right of the people to know' what Government does has always been reduced by 'the right—or duty,—or reponsibility—of the Government to withhold' in the public interest." *See,* Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers,* 120 Colum. L. Rev. 271, 275 (1971).

public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox* v. *New Hampshire,* 312 U.S. 569, 574 (1941).

It benefits no one to say that the State can determine that certain matters of public interest should be kept confidential, but that the press is free to use whatever means it chooses to discover that information and to print what it learns. That kind of trial by battle and cleaverness between the State and the press hardly seems the way best to further the various aims of a democratic society."

In speaking of the responsibility of all institutions in this country to work together to achieve mutual goals, Mr. Justice Frankfurter summed it up when he wrote:

> "No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was imbedded in the law."[13] *Pennekamp* v. *Florida,* 328 U.S. 331, 335-6 (1946) (Frankfurter, J., concurring).

A society which recognizes no check upon its freedom soon becomes a society where freedom is lost. This country was founded upon a system of checks and balances, and no

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[12] Id. at 278.

[13] The Virginia Constitution contains a provision that one must be responsible for the abuse of the right to free speech and the press. Article I, Section 12 of the Constitution of Virginia (1971).

institution, including the press, is free to use arbitrary power. If freedom of the press is used to undermine the confidence of the people in the institutions of our free society, our free society may die.

The restraint upon expression imposed by § 2.1-37.13 is narrowly limited, and is related solely to the purpose sought to be served by the legislature: the preservation of the confidentiality of Commission proceedings during the investigative process. Newspapers, such as Landmark, as well as any person are free to comment upon or criticize any judge as they deem necessary and appropriate. They are free to discuss the short comings of the administration of justice, and the fitness of any person to sit upon the bench. Section 2.1-37.13 provides no impediment to such expression. The robust reporting and criticism of the criminal justice system spoken of in *Nebraska Press Ass'n.* v. *Stuart, supra,* is clearly alive and well in the Commonwealth of Virginia. The judicial system as well as members of the judiciary are routinely subjects of debate and criticism. What is viewed in the public domain remains fair game for the press and public alike. The only matters which remain out of reach are the unfounded and unwarranted attacks upon the judiciary. The public need not wallow in spurious attacks upon the judiciary in order to form sound judgments about the administration of justice.

The cases relied upon for support by Landmark are inapposite to the issue underlying this case. *Virginia State Bd. of Pharmacy* v. *Virginia Citizen's Consumer Council,* 425 U.S. 748 (1976); *Bates* v. *State Bar,* 45 U.S.L.W. 4895 (U.S. June 27, 1977); and *Linmark Associates, Inc.* v. *Township of Willingboro,* 45 U.S.L.W. 4441 (U.S. May 2, 1977), all deal with restraints upon the free flow of commercial information. The publication of information which undermines the confidence of the people in the administration of

justice is simply unlike the hawking of one's wares in the marketplace.[14]

Neither *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), nor *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), lend support to Landmark. In neither of those cases was the Court confronted with the publication of materials expressly declared by constitution and statute to be confidential. Additionally, unlike the present case, each of those cases while dealing with criticism of public officials, the criticism was based upon information obtained in the public domain. Such criticism is not impeded by § 2.1-37.13.

II.

The Commonwealth Is Not Required To Produce Actual Facts To Show A Clear And Present Danger To The Administration Of Justice Where Such Determination Has Been Made In The State Constitution And Statute.

The principal thrust of Landmark's position is that before a state may punish a violation of a restriction upon expression, it must satisfy the "clear and present danger" test. This test, Landmark maintains, requires the state to prove by actual facts that the expression it seeks to prohibit would result in an evil which is substantial and imminent, posing a clear and present danger to a legitimate governmental interest. In support of its position, Landmark relies principally upon *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); and *Wood* v. *Georgia*, 370 U.S. 375 (1962).

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[14] This same distinction may be applied to the cases of *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), and *Carey* v. *Population Servs. Int'l.*, 45 U.S.L.W. 4601 (U.S. June 9, 1977), relied upon by *amici curiae*.

After reviewing these cases, the Supreme Court of Virginia found them to differ substantially from the present case. Each of those cases was concerned with the common law power of a court to punish allegedly contemptuous out-of-court statements concerning pending cases. As recognized by this Court in *Bridges*, the imposition of sanctions in such circumstances was based upon a "concept of the most general and undefined nature." 314 U.S. at 260. This Court feared that without evidence of a clear and present danger, the undefined power of contempt would stifle fair criticism of the judiciary. As pointed out in Part I, the statute under attack does not stifle fair criticism of the judiciary.

Another important distinction between the cases relied upon by Landmark and the present case is amply pointed out in *Craig* v. *Harney*, 331 U.S. 367, 374 (1947):

> "A trial is a public event. What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.* There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." (Emphasis added.)

Standing in sharp contrast to the general and undefined power of contempt, so central to the decisions focused upon by Landmark, is the fact that the power of a Virginia court to punish out-of-court statements of the type at issue here is fixed by statute. The substantive offense for which punishment may be imposed is clear and well-defined. The fact that

the legislature has dealt with this question by statute raises this case to a level of legal dignity not enjoyed by the contempt judgments involved in *Bridges, Pennekamp, Craig* and *Wood*. Indeed, in *Wood*, this Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitation imposed by the Georgia Legislature in punishing out-of-court statements. . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation'. . . ." 370 U.S. at 385-86.

This Court also recognized in *Bridges*, that a declaration of a State's policy weighs heavily in any challenge of the law as infringing constitutional limitations. In this regard, this Court said:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the courtroom which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of a State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.'" 314 U.S. at 260-61.[18]

Further support for the Commonwealth's position that the cases relied upon by Landmark are not controlling is found in Mr. Justice Douglas' opinion in *Craig*. After reviewing *Bridges, Pennekamp*, and other cases involving contempt, Mr. Justice Douglas stated:

> "Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its courts. The problem presented is only a narrow, albeit important, phase of that problem—the power of a court promptly and without a jury trial to punish for comment on cases pending before it and awaiting disposition." 331 U.S. at 373.

This case, unlike those cited by Landmark, comes to this Court not upon some uncircumscribed common law power of contempt, but springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable.

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[18] "By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. . . . The State cannot reasonably be required to measure the danger from every utterance in the nice balance of a jeweler's scale." *Gitlow* v. *New York*, 268 U.S. 652, 668-69 (1925).

The Virginia Supreme Court found that the reasons which prompted the creation of the Commission were much more than minor matters of public inconvenience or annoyance. They were found to be matters involving a serious and substantive evil—the imminent and substantial threat to the orderly administration of justice posed by the premature disclosure of the confidential proceedings of the Commission. Because of their importance to society, the Court found that no courtroom evidence was necessary to sustain their truth and validity.

That the Commonwealth was not required to produce actual facts to show a clear and present danger is supported by this Court's decision in *Dennis* v. *United States,* 341 U.S. 494 (1951). This Court in upholding a conviction under the *Smith Act* held that guilt is established by proof of facts, but the doctrine that there must be a clear and present danger is a judicial rule to be applied as a matter of law by the courts.

There is no legislative history, as this term is used in relation to federal legislation, dealing with the questioned statute. This does not mean, however, that legislative deliberation is lacking. The legislature is presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent. *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802, 809, (1969).

History and experience have clearly shown that the methods of dealing with disabled or unfit judges by legislative impeachment or removal, existing prior to the creation of the Commission, were seldom used and generally unsatisfactory.[16] This state of affairs lead Virginia, as well as other states, to

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[16] *See In Re Diener,* 304 A.2d 587 (Md. 1973).

seek an alternative means of handling problem judges. This search for an alternative gave birth to commissions to investigate complaints against judges.[17]

A commission or other bodies to investigate complaints against judges have now been adopted in forty states and the District of Columbia and Puerto Rico. A list of these jurisdictions with their enabling legislation is set forth in a footnote on page 39 of Appellant's brief. These jurisdictions by constitution, statute or rule impose a requirement of confidentiality in commission proceedings.[18] The Supreme Court of Virginia found that the requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious. (JA 72-73).

These reasons found by the Supreme Court of Virginia to justify the requirement of confidentiality are supported by court decisions and legal writers alike.[19] These reasons are

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[17] Gasperini, Anderson, and McGinley, *Judicial Removal in New York: A New Look,* 40 Ford.L.Rev. 1 (1970); Braithwaite, *Who Judges the Judges?* (Am. Bar Found. 1970).

[18] There is presently pending in Congress a bill to establish a federal Council on Judicial Tenure. H.R. 1850, 95th Cong., 1st Sess. (1977). This bill would also require confidentiality in such proceedings.

[19] *McCartney* v. *Commission on Judicial Qualifications,* 116 Cal. Rptr. 260, 526 P.2d 268 (1974); *Nichols* v. *Gamso,* 382 N.Y.S.2d 755 (Ct. App. N.Y. 1976); *Forbes* v. *Earle,* 298 So.2d 1 (Fla. 1974); Note, *Remedies For Judicial Misconduct and Disability: Removal*

exemplified by the Supreme Court of Florida in *Forbes* v. *Earle*, 298 So.2d 1, 4 (1974):

> "The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges. . . . Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system."

Landmark asserts that the first two reasons found to support the requirement of confidentiality, while significant, are insufficient to support sanctions on truthful reporting about individual judges or the judiciary as a whole. The Commonwealth fully concurs in this judgment of Landmark as it pertains to information gained in the public domain. Cases decided by this Court establish this proposition beyond peradventure. But, it is one thing to print information obtained in open hearings, and quite another to print information declared to be confidential.

The creation of the Commission was for the express purpose of giving the people a method by which errant judges could be effectively disciplined. The Commission was not created to give disappointed litigants and others a platform upon which to vent their spleens against judges, and thereby

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and Discipline of Judges, 41 N.Y.L.Rev. 149 (1966); Note, *The Commission Removal Plan: A Corrective Remedy for Judicial Misconduct in Iowa*, 55 Iowa L.Rev. 1020 (1969); W. Braithwaite, *Who Judges the Judges?* (Am. Bar Found. 1970); Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal with Judicial Misconduct*, 3 U.S.F.L.Rev. 244 (1968-1969).

to lend some aura of official status to their epitaphs. A study has shown that about two-thirds of the complaints received by commissions are *prima facia* trivial. W. Braithwaite, *Who Judges the Judges?*, 162-163.

The proceedings are an inquiry into the conduct of judges the aim of which is the maintenance of the honor and dignity of the judiciary and the proper administration of justice rather than punishment of the individual. *In Re Diener*, 304 A.2d 587 (Md. 1973); *In Re Kelly*, 238 So.2d 565 (Fla. 1970).

The mere existance of the Commission and the threat of possible action solve many problems. In the preliminary investigative stage, confidentiality allows for corrective action to be taken short of censure, reprimand or removal. In those cases where termination of service is warranted because of mental or some physical ailment, confidentiality allows the judge to avoid the spectacal of a public trial by resigning or retiring. Confidentiality also facilitates discipline for "minor" misconduct not serious enough to warrant public censure. Publicizing incidents of minor misconduct serves no purpose in most cases, and contrition and cooperation from the judge are more likely if he is not made needlessly to suffer a public recitation of his professional or personal failings.

This very reasoning was addressed by the Court in *Nichols* v. *Gamso*, 382 N.Y.S.2d 755 (1976):

> "Implied in the imposition of a sanction short of removal is the conclusion that continuation in judicial service will be in the public interest. It would then be inconsistent, in the absence of weighty contraindication, to expose the Judge to disclosure of accusations, which in the light of the limited disciplinary determination are rationally irrelevant but might lead to unfair prejudice and notoriety, thereby without warrant impair-

ing his capability to render effective judicial service in the future."

In *People* v. *Culkin,* 162 N.E. 487 (N.Y. 1928), a case involving dicipline of an attorney, Chief Justice Cardozo provided sound reasons for confidentiality in Commission proceedings:

> "The argument is pressed that, in conceding to the court a power of inquisition, we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing and make report as to one's conduct may become a slur and a reproach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages." 162 N.E. at 492.[20]

Public understanding of the judicial processes can best be obtained through the discussion of matters which have reached the level of verified complaints. The public interest is not served by discussion of unfounded allegations of misconduct which defame honest judges. Such discussion serves only to demean the administration of justice and renders the courts all suspect to the public, thereby increasing disrespect for law and order. *In Re Kelly, supra.* Courts, be they high or low, should and must be like Caesar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in the administration of justice.

Landmark asserts that the third justification for the statute

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[20] *See, Anonymous Nos. 6 and 7* v. *Baker,* 360 U.S. 287 (1959).

is likewise insufficient. This purpose is to protect complainants and witnesses from possible recrimination for bringing matters to the attention of the Commission. It goes without saying that the Commission would not and could not function if citizens were in fear of reprisals should they make a complaint.

In practice, the name of the complainant is never made known to the judge under investigation. When a complaint is received, a preliminary investigation is conducted to ascertain whether there is any substance to the complaint. If evidence is found to warrant a formal hearing, it is the Commission, not the complainant, who prefers charges against the judge. The complainant's name remains secret even in those cases which are filed with the Supreme Court, since the name of the original complainant is never made a part of any public record.

The fact that confidentiality is essential to protect the name of a complainant is attested to by studies in which attorneys clearly indicated that they would hesitate to complain about a judge if their identity as complainants might become known. Note, *Remedies For Judicial Misconduct and Disability: Removal and Discipline of Judges,* 41 N.Y.L. Rev. 149, 194 (1966); W. Braithwaite, *Who Judges the Judges?,* 162, 163.

As noted by the Supreme Court of Virginia, the rule of confidentiality also protects witnesses prior to the determination that the complaint is meritorious. Landmark maintains this justification is insufficient to sustain the statute. As Landmark points out, once a formal hearing is conducted, the judge obviously becomes aware of any witnesses who give evidence before the Commission. This is necessarily so because in our society it would be unthinkable to remove a judge from office without his having had the opportunity to confront the witnesses against him.

The interest served by this justification is to encourage lay persons as well as attorneys to come forward in the preliminary stages of an investigation and supply information which will assist the Commission in determining the merits of the complaint. In those instances where it is determined that the complaint is without sufficient merit to warrant further action, those persons who came forward should not be placed in the possible position to suffer recrimination at the hands of the judge. It may well be that the information furnished by witnesses during the preliminary stages of an investigation may point up some "minor" misconduct on the part of a judge which would not warrant public censure. In these situations, the Commission can take corrective action and the anonymity of the witnesses is maintained and thereby their interests protected. Witnesses whose identities become known at formal hearings have their interests protected by the Commission and the courts.

It is true, as pointed out by Landmark, that the article published in this case did not reveal the name of any witness to Commission proceedings. It is not true, however, as Landmark asserts, that actual events in Virginia have shown that press coverage of Commission proceedings has provided witnesses with protection against the risk of reprisal. In an article carried in the Richmond News Leader on May 4, 1977), see copy of article attached, page 41) not only was the name of a witness published, but the article went on to disclose the name of the attorney and his firm who had initiated the complaint. This article points out all too clearly the need for the statute.

The authorities agree that confidentiality is necessary to protect complainants and witnesses.[21] In the case of *McCartney* v. *Commission on Judicial Qualifications,* 526 P.2d

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[21] *See,* note 19 *supra.*

268 (Cal. 1974), the court upheld the confidentiality requirements even when the subject judge requested an open hearing. In reaching its conclusion, the Court held:

> "This state has adopted a constitutional policy that proceedings before the Commission shall be confidential. . . . While such a policy undoubtedly was adopted in part to protect the particular judge charged with misconduct and might, therefore, arguably be waived by him, we recognize that the provision for confidentiality also protects witnesses and citizen complainants from intimidation. Inasmuch as confidentiality is constitutionally authorized, is based on sound reason, and is imposed in proceedings which are neither criminal nor before a 'court of justice' we perceive no impropriety in the Commission's refusal to open the hearings before the special masters to the public." 526 P.2d at 274.

Landmark asserts that the restriction on reporting is not the narrowest means of protecting witnesses and suggests alternatives. Landmark suggests that lawyer-witnesses might be protected by disqualification rules as to the judge under investigation. The Commonwealth submits this is hardly a viable alternative. If such a rule were adopted, then any attorney could engage in judge shopping by merely filing a complaint against a judge whose view of the law was inconsistent with that of the attorney. Such a situation would hardly serve the public interest.

Landmark also suggests that the interests of other witnesses might be protected by a monitoring program. The Commonwealth submits such a program offers less protection than confidentiality. Witnesses already have available to them the Commission to monitor cases of retribution. Retribution can take many subtle forms which a monitoring program could not realistically be expected to uncover. Therefore, confidentiality offers the best protection to witnesses.

As pointed out by Landmark, only Virginia and Hawaii make it a crime to disclose any part of Commission proceedings. It should be noted, however, that Minnesota, New Mexico and Wyoming punish violations of a witness' oath as a contempt. Whether other states seek to impose criminal sanctions is irrelevant. Virginia has merely provided the means necessary to effectuate its policy. To declare that Commission proceedings are to be confidential without providing the means of enforcement has a hollow ring, as this case fully attests.

The reasons for adopting the Commission and confidentiality have been shown by history and experience to be justified. The legislature of Virginia clearly was aware of these circumstances at the time of the adoption of § 2.1-37.13. These circumstances were the subject of great discussion during the passage of Virginia's new Constitution in 1971. Thus, this statute comes to this Court "encased in the armor wrought by prior legislative deliberation."

Forty-two jurisdictions have found it necessary to establish some type of judicial disciplinary procedure. Nearly half of these have done so by constitutional provision. Confidentiality is the hallmark of these proceedings, and to say that confidentiality is not justified is to denigrate the collective judgment of the people. The citizens of Virginia made the judgment that confidentiality in such proceedings was in the public interest when it adopted the new Constitution in 1971, and now the press would seek to deny that judgment.

> "Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment." *Dennis* v. *United States,* 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring).

III.

Virginia Code Section 2.1-37.13 Is Not Unconstitutionally Vague Or Overbroad.

Landmark argues that the statute is vague in several respects. First, it is urged that the statute is ambiguous in that it is unclear what constitutes "divulgence". As found by the Supreme Court of Virginia, the word "divulge" means to disclose or to make known. The Commonwealth submits this is the common everyday definition of that term and is accepted as such. Landmark urges that since the word "divulge" also has a meaning limited to the first act of disclosure, the statute does not give fair warning of what activity is proscribed.

The fact that a word may have more than one meaning, which can be said of almost any word, does not render the statute unconstitutional. The intention of the legislature must be examined in order to see how the word harmonizes with the object of the statute. In *Northrop* v. *Richmond,* 105 Va. 335, 53 S.E. 962 (1906), the Supreme Court of Virginia, citing Mr. Justice Story, addressed this issue and said:

> "Where a word is used in a statute, which has various known significations, I know of no rule that requires the Court to adopt one in preference to another simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intention of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature." 105 Va. at 339.

In discussing statutory construction, this Court in *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 386 (1948), stated:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed."

When the word "divulge" is read in context with the other language of the statute, it can only mean that it is prohibited to disclose or to make known information concerning Commission proceedings prior to the filing of a complaint in the Supreme Court. To ascribe to the word "divulge", the limited meaning of the first act of disclosure would be to eviscerate the statute. What purpose could possibly to served by the statute if you can read about confidential Commission proceedings on the front page of the newspaper?

Landmark also urges that the statute is vague in that it fails to make clear an intent to include newspaper reports. A look at the language of the statute itself discloses the weakness of this argument. In unmistakeable terms, the statute provides for the confidentiality of Commission proceedings, including the identification of the subject judge and provides that this information "shall not be divulged by *any* person to *anyone* except the Commission." The statute further provides that "*any* person"[22] who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." Had the legislature intended to exempt newspaper reports from the applicability of this statute, it would

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[22] Landmark, although a corporation, is included within the meaning of person. *See*, Section 1-13.19, Code of Virginia (1950), as amended.

have clearly said so. An exemption to newspapers would defeat the entire purpose of the legislation.

The legislation itself clearly recognizes certain exemptions. The requirement of confidentiality is not intended to apply to a subject judge when discussing such proceedings with his attorney, § 2.1-37.12 and Rule 6, Rules—Judicial Inquiry and Review Commission, 215 Va. 937, and when information is requested by the Legislature, § 2.1-37.17:1.

The English language has its limits, and this statute speaks clearly except to those few who would use tunnel vision when examining it. In *CSC* v. *Letter Carriers*, 414 U.S. 548, 578-79, this Court said:

> "[T]here are limitations to the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. '[T]he general class of offense to which . . . [the provisions are] directed is plainly within [their] terms . . ., [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise.'"

In the area of examining state statutes for vagueness, this Court laid down the following rule in *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972):

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

Here the language utilized gives fair warning to the ordinary person exercising ordinary common sense that the divulgence of confidential information regarding Commission proceedings is prohibited. There is no lack of notice in this statute, nothing to entrap or fool the unwary.

Landmark finally asserts that the statute is overboard, and suggests some hypothetical situation which it believes supports this argument.

There is a danger in trying to judge statutes in terms of hypothetical applications since the court risks rendering decisions founded upon conjecture. The importance of having a concrete issue derives partly from the importance of having a record upon which to arrive at an informed judgment. "It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Bigelow* v. *Virginia*, 421 U.S. 809, 830 (1975) (Rehnquist and White, J.J., dissenting)."

It is suggested that if a witness felt that a judge had taken retribution against him for giving testimony, his disclosure of this fact to anyone other than the Commission itself or even the bringing of a law suit to redress this grievance would be subject to criminal sanctions, as would the reporting of such events. The Commonwealth believes that the interest of the witness in being able to report such matters to the Commission is ample protection. Actual events have shown that a witness who finds himself in such circumstances can also seek relief from the courts. This is illustrated by such a case as referred to in the Appellant's Brief 31. In that case, the witness has filed suit alleging intimidation, and the newspapers have reported this fully. Neither the witness

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" *See Baggett* v. *Bullitt*, 377 U.S. 360, 383 (1964) ("[t]o conjure up such ridiculous questions . . . is to build up a whimsical and farcical straw man which is not only grim but Grimm.") (Clark, J., dissenting).

nor the newspaper have been charged with any violation of the statute.

It has been suggested by *amici* that the statute would prevent a witness from revealing Commission matters to his attorney, and would prevent the reporting of a bribe. Again, actual events belie the first concern. The records of the cases which have become public upon being filed with the Supreme Court show that the Commission has permitted witnesses to appear with counsel, and the Commonwealth has never considered this to be a violation of the statute. The Commonwealth would also submit that it would not be a violation of the statute to report to law enforcement officials or for the newspapers to print the allegation of a bribe. This could clearly be done in a way to avoid revealing any confidential information, and it has never been shown that the Commonwealth would use this statute to suppress information of a criminal act.

Declaring a statute facially unconstitutional because of overbreadth "is, manifestly, strong medicine" and "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.

The Commonwealth submits that actual events establish that the questions raised as to the overbreadth of this statute are unwarranted and unfounded. The Supreme Court of Virginia has not been confronted with any of these hypothetical suggestions by concrete facts, and this Court should not strike down this statute on the basis of "irrational imaginings". *Aptheker* v. *Secretary of State*, 378 U.S. 500, 525 (1964) (Clark, J., dissenting).

CONCLUSION

Freedom of the Press is without doubt one of the hallmarks which separates this Country from the rest of the World. Such freedom, however, is not an absolute, and cannot be allowed to destroy the effectiveness of the Commission for judicial discipline and threaten the orderly administration of justice. The State has both the duty and the right to protect its institutions. When the State has taken steps to remove important and sensitive matters from the public domain, and has declared such matters to be confidential, then the State has the right to punish those who would do it damage by breaching that confidentiality.

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, and a member of the Bar of this Court, do hereby certify that three printed copies of the foregoing Brief of the Appellee were mailed, post pre-paid, this 30th day of August, 1977, to each of the following:

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APPENDIX

Richmond News-Leader, Wed., May 4, 1977.

Va. Panel Weighs Evidence on Judge

By SUZANNE WOOTON

The State Judicial Inquiry and Review Commission reportedly is weighing testimony given during at least four secret hearings on complaints against Henrico General District Court Judge H. Ratcliffe Turner.

The five-man commission must determine whether the complaints against Judge Turner are serious enough to be filed with the Virginia Supreme Court. If the group decides to file the complaints, it could ask the high court to censure, remove or retire the judge.

However, the commission has filed complaints against state judges only three times since it was established in 1971. In two of those cases, the group recommended that the high court censure the judge involved.

In the two final days of hearings here last week, the commission reportedly heard testimony from witnesses called by Judge Turner's lawyers. Henrico Commonwealth's Atty. Donald R. Howren and several assistant commonwealth's attorneys reportedly were among those witnesses.

The witnesses reportedly were questioned about the 51-year-old judge's general courtroom demeanor and judicial conduct. During two secret hearings here in late March, the commission reportedly was told that Judge Turner repeatedly was late for court and that he has made improper comments from the bench.

The commission also is probing a number of other complaints, including one filed last fall by Richmond attorney Murray Janus which prompted the commission's initial investigation of Judge Turner.

Janus, a member of the law firm of Bremner, Baber and Janus, reportedly complained that Judge Turner raised the bond for a client of Janus' firm when the client requested a continuance of his case because his lawyer could not be present.